Nos. 15,107 and 15,108

IN THE

United States Court of Appeals

For the Ninth Circuit

S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green, *Appellants,* vs. Robert L. Martin, *Appellee.*	No. 15,107
S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green, *Appellants,* vs. L. A. Martin, *Appellee.*	No. 15,108

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I.

APPELLANTS' REPLY TO CONTROVERTED FACTS.

The appellees in their brief strenuously contend that the appellants, for more than ten pages, were unable to properly state the facts. The appellants do not

claim to be infallible in respect to the statement of the facts. It is noted by the appellees that the appellants, at page 11 of their brief, stated that so far as could be gleaned from the record, only those employees who were actually off shift and certain Alaska Road Commission employees indulged in the privilege of drinking, and in order to support their dispute of that statement, the appellees recite the testimony of Mr. Vaughn Manor. In this connection it will be remembered that Mr. Vaughn Manor did not arrive at the scene of the incident until about 7 o'clock P.M. (R. 252). Mr. Vaughn Manor was a paving foreman who checked out at 8 o'clock P. M. on the evening in question and who, on the day of the incident involved herein, and more particularly between the hours of 6 and 7:30 P.M. (the time of the incident, allowing for margin of error) had three roller operators working at different spots between Anchorage and Girdwood. Archie Vermilyea (R. 283) was operating the roller at the site of the incident, another roller (R. 253) was working on a patch near the Sad Shack and still another was working on a segment of the black top near Potter. Mr. Vaughn Manor, at R. 254, admits that he had a couple of cans of beer (obviously after his return to the scene at 7:00 P.M.) and accordingly a more proper statement of the facts should probably have been none of the former employees who were named defendants, and certainly none of the individuals who were ultimately held responsible by the verdict of the jury, where shown to have been consuming any beer or whiskey, until they were off duty. We would assume that since Mr. Vaughn Manor was

not present at the time the altercation took place, that the appellees would concede that the actions of Mr. Vaughn Manor should have no effect, direct or indirect, on the litigation herein involved.

The chief complaint of the appellees seems to stem from the propensity of the appellants in their recital of the facts to refrain from the use of such descriptive adjectives or phrases as "gang" (p. 3 appellees' brief), "attack" (pp. 2, 8 appellees' brief), "time of the attack" (p. 7 appellees' brief), "mob broke and poured" (p. 3 appellees' brief), "drunken mob" (pp. 2, 3 appellees' brief), "brutally beaten" (p. 2 appellees' brief), "alcoholic party" (p. 6 appellees' brief), "brutally and violently beaten" (p. 3 appellees' brief), and so forth.

Appellants do not particularly contest the right of the appellees to use such descriptive language as they think best to narrate the facts herein presented. Appellants are willing to concede that it is a Constitutional privilege in this free land of ours to have a difference of opinion. Appellants would even concede that the Constitution guarantees the right of a man to be wrong in his opinions. However it is the position of the appellants that what the appellees recite as fact are in some respects the result of overindulgence in pleadings and treating with pleadings as facts.

At appellees' brief page 3, the appellees say:

> "In this attack upon the elder Martin, a blow on the back of the head with a rock and a kick in his face rendered him unconscious (R. 116),

> and he was left lying on the ground with his dentures broken to bits and with blood streaming from his mouth. (R. 327.)"

It is indeed true that at R. 327 Ross McDonald, one of the named defendants, against whom no verdict was returned, does support the facts as recited by the appellees that the elder Martin was losing some blood through his mouth. However the appellants challenge the appellees to show where at R. 116 they can support the proposition that the elder Martin received a blow on the back of the head with a *rock*. (Emphasis added.) The appellants submit that the word *"rock"* is no where to be found on R. 116 and accordingly it is quite obvious that the appellees are supplementing the record with the pleadings. Paragraph V of the appellees' amended complaint at R. Volume 1-08 page 12 alleges as follows:

> "That the injuries were brought about through unlawful acts, that is, assault and battery, and a felony known as assault with a deadly weapon, to-wit: at least one large rock held on the hand of one of the mob, with which he was struck a severe blow at the back of the head. . . ."

We think it is quite understandable that the appellants cannot read into the record the connotation and additional phraseology that seems desired on behalf of the appellees and accordingly contend that the appellees' criticism of the appellants' statement of the facts based on incidents as above described, is not justified.

The appellees contend at page 4 of their brief:

> "The appellees were forced to remain in the area for approximately thirty (30) minutes. (R. 222.) They were finally allowed to leave after the arrival of the Territorial Police. (R. 239.)"

and again at page 9 of their brief, the appellees say on the same subject:

> "The Territorial Police did, however, eventually arrive and upon arrival of the police the appellees were released by the gang."

Now in support of those two particular quotations that deal with alleged force, the appellees recite R. 208, 222, 239 and 172. Obviously at R. 208 the appellees have reference to the answer of Robert L. Martin found at the bottom of the page. In one response Robert L. Martin is telling what he *figured* and he *thought*. A part of that answer reads as follows:

> ". . . As a matter of fact, I figured that he had had it; I thought he was dead, so when I jumped back in the car; I called in for the Highway Patrol and an ambulance because I thought that—well, I figured when they had beat us up as much as they had that they'd be saying, 'Let him go' . . ."

Now it is conceded that although the testimony relied upon by the appellees is in the record and accordingly can be used by the appellees since it was not objected to at the time of trial, it is an opinionated, self-serving statement on the part of the witness. By any standard it is mighty weak evidence upon

which to quarrel with the facts outlined by the appellants.

At R. 222, likewise relied upon by the appellees in support of the proposition that they were forced to remain, it can be seen that the clear inference of the testimony is only that about thirty minutes expired before the Highway Patrol, which the appellees had called, arrived at the scene of the accident. The appellees admit at R. 239 that they called the Highway Patrol and there the clear inference of the evidence is that since the appellees elected to remain at the scene of the accident, someone, supposedly Ross McDonald (R. 326, 328) directed that they refrain from blocking traffic on the highway and that instead if they desired to wait for the Highway Patrol that they should wait on the west side of the road. There is no great dispute in the record at this point because we find that at R. 328 Ross McDonald states that his main concern was relieving the traffic jam which was getting increasingly worse and therefore he desired to have the Martin car pulled out of the line of vehicles in order that traffic might be resumed.

There is nothing in the record to support the appellees' statement that they were "released by the gang" after the Territorial Police arrived except a bald statement that there was in fact a gang holding him or them.

Now, appellees take exception to the statement by the appellants that Robert Martin lost only two teeth

and contend that in fact Robert Martin lost his entire upper set of teeth as a result of the beating at the hands of the appellants' employees. The appellees cite R. 241 for authority that the entire set of teeth was knocked out when in fact the record discloses at pages 240 and 241, question by Mr. Bell:

> "Mr. Martin, you testified about your teeth being knocked out and some of them being loose. How many teeth did you lose by extraction and by being knocked out?
>
> A. I lost my entire upper set of teeth.
>
> Q. Do you have a plate or false teeth there now?
>
> A. I have an upper plate."

No particular contest is made of the fact that Robert L. Martin testified in substance that he did in fact, at the time of the trial, have an entire upper plate, but we do contest the allegation that he lost them in the accident involved in this litigation. R. 404 reads as follows:

Question by Mr. Hughes on cross-examination.

> "Well, now this was after the accident of December 28, 1952, then that you had these dentures placed?
>
> A. That is right. He told me—I was trying to get a bridge and he told me it was going to cost some $750.00 to $1,000.00, what he figured would be a temporary bridge, and I was trying to get the money enough together to get that kind of work done and then after the automobile struck me I figured it's going to be a long time, I better take the cheaper way, I will get something so I can eat.

Q. Well, then the second accident, that cleaned out the rest of your teeth?

A. The second accident didn't touch my teeth.

Q. How many teeth did you have left after the second accident?

A. I couldn't answer that question. I just don't know.

Q. You don't know whether you had 2 or a dozen, is that right?

A. I can answer it this way: I had 2 teeth kicked out, 2 teeth in the same upper and same location were loose to the point that I couldn't chew anything. I had previously in the Service had 1 tooth pulled out and I believe I had a wisdom tooth taken out. To the best of my knowledge they were all there after the fight as well as after the time the car struck me."

It may be that this quibble over facts is insignificant but certainly where the witness testified that he had his teeth extracted it is far different from a bald statement that the subject's teeth were in fact knocked out by virtue of a traumatic incident involved in this litigation. The least that could be said in this regard would be that while the cost incident to the repair of the teeth might be the cost of entire dentures, certainly the pain or suffering occasioned by the traumatic incident involved in the complaint, should be stripped of the implication that a half mouth of teeth or the upper side thereof was completely smashed or knocked out at one violent occurrence.

II.

THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S FINDING OF THE MASTER AND SERVANT RELATIONSHIP AND THIS COURT IS FREE SO TO HOLD UPON THE PRESENT RECORD.

The appellants in their opening brief urged that the essential elements necessary to establish a master and servant, employee-employer, or principal and agent relationship between the appellants and the individual actors found responsible by the verdict of the jury, was lacking, and accordingly there was an insufficiency of evidence to sustain the verdict against the appellants. It was further contended by the appellants that the failure of the jury to find against the defendants Ross McDonald and R. E. Wise was in fact a discharge of the appellants, for the reason that only those defendants had the dignity of office or employment such as would, by their actions, bind the appellants.

On the other hand the appellees pose in their brief, three possible avenues of recovery: (A) that the employer-employee relationship existed between the actors and the appellants and accordingly appellants must be bound; (B) that there did in fact exist a riot or mob violence; and (C) that the appellants are liable to the appellees for the creation of a dangerous condition.

(A) The first and apparently the prime theory of recovery is urged by the appellees on the ground that the employer-employee relationship existed at the time of the incident complained of in the appellees'

complaint. It is on this theory that a great preponderance of the authority recited by the appellees finds its bearing. The appellants have read in detail all of the authority cited by the appellees, a greater portion of which is taken from an article of Professor Ben F. Small of the Indiana University School of Law.

It is interesting to note that Professor Small urges that the authority recited in his article supports the proposition that:—the trend is toward a workmen's compensation-like treatment of the agency tort cases. This theory is expounded by the appellees at page 16 of their brief. If the trend of which the appellees speak is very pronounced, it certainly would appear that it is not of recent origin because at least 50% of the cases cited by the appellees, a greater portion of which appear to be taken from Professor Small's article, are more than thirty years of age.

Practically all of the liability cases cited by the appellees wherein the master was found responsible for the acts of his servant, were aggravated cases which, upon reading the facts, one would indeed be surprised if the master had not been held responsible. In nearly every case cited, with the possible exception of a workmen's compensation case, the employer-employee relationship admittedly existed at the exact time of the act complained of and in each case the court determined under the factual situations variously presented, that the agent was in fact doing an act in furtherance of the master, principal or employer's business or vocation.

With the above in mind the appellants contend that the authority recited by the appellees may well be good law for the propositions for which they stand, but the law is not applicable to the factual situation in the case at bar, where the employee-employer relationship, as appellants maintain, was not in existence and in fact was neither alleged with certainty nor proved by the weight of the evidence.

Indeed the only evidence that we have (see defendants' Exhibits A and B) outside of the unsupported statement of the appellees, is that the individual actors found responsible for the appellees' injury by the verdict of the jury, were free agents and members of the general public. The previous employment of the actors up to the time of their respective checkouts, as is shown by the defendants' Exhibits A and B, was the occasion for their presence at the time of the incident alleged and set forth in the appellees' complaint, and nothing more.

Since some question has arisen in the appellees' brief as to exactly what is disclosed by the appellants Exhibits A and B, those being the two exhibits containing the time cards of the some 55 hourly employees of the appellants, let us summarize exactly what is shown and more particularly let us review defendants' Exhibits A and B to determine exactly who was on the payroll of the appellants after 6 o'clock P.M. on the day in question.

It must be admitted that the altercation took place not earlier than 6 o'clock P.M. and not later than

7:30 P.M. on the day in question. In other words, it was some time after 6 o'clock that the incident took place and accordingly we should see what employees of the appellants actually worked after 6 o'clock. Defendants' Exhibits A and B disclose as follows:

Elmer Vermilyea, rodman, checked out at 6:30;

T. L. Mayfield, heavy duty mechanic, 9:30 P.M.;

Vaughn Manor, foreman, checked out at 8 o'clock;

L. A. Woodman, asphalt roller, 9 o'clock P.M.;

Rex Worthington, dozer operator, 6:30 P.M.;

Archie Vermilyea, patrol operator, 7 o'clock P.M.;

Perry Powell, heavy duty truck driver, 7:30 o'clock P.M.;

Arthur D. Smith, heavy duty truck driver, 7 o'clock P.M.;

John G. Shields, light duty truck driver, 7 o'clock P.M.

Charles Caron, oiler, 10 o'clock P.M.

George E. Cowdery, flagman, 7 o'clock P.M.

Gunnar Lende, laborer and flagman, 7:30 o'clock P.M.

It would accordingly appear that exclusive of salaried employees, 11 workmen and one foreman, Vaughn Manor, were on the payroll after 6 o'clock P.M. and it is worthy of note that none of the workmen above named was even mentioned by inference or otherwise in the entire transcript of the record as participating in the controversy. Vaughn Manor ad-

mittedly returned to the scene after the incident involving the appellees had been completed. Archie Vermilyea was operating a rolling machine which never stopped. (R. 305.)

In contrast, the participating actors and the parties who had been employed by the appellants during the day on which the incident took place, were John P. Bell, Duane J. Weber and Cecil Sipes. John P. Bell was a dozer operator by classification and his shift ended at 5:30 o'clock P.M. Cecil V. Sipes was a heavy duty truck driver. His shift ended at 5:30 o'clock P.M. and Duane J. Weber, a heavy duty truck driver, ended his shift at 6 o'clock P.M.

The appellants submit that the evidence is not only clear that the employer-employee relationship had ceased but that none of the actors was doing anything remotely connected with the furtherance of the appellants' business or within the scope of their previous employment.

B. As has heretofore been pointed out in the appellants' opening brief, the appellees' case was laid in the lower court on a theory of riot or mob violence. This theory has all but been abandoned on appeal. The appellees, at pages 23 through 26 in their brief, treat with the existence of a riot but cite no authority therefor, either in law or fact. The substance of the appellees' argument on the existence of riot is that at some places in the testimony the witnesses made reference to more than three persons being present at the scene of the incident. Apparently the appellees

rest on the proposition that if there were in fact 9, 10 or 15 men present at a given time that the jury would be justified in allowing a verdict on the basis of mob violence or riot. The court should have taken from the jury the question of riot so far as the appellants are concerned.

The appellees further contend that the appellants' argument is erroneous because the appellants' argument deals with the criminal aspect of riot. It is conceded that riot is a crime and that generally the definition of a riot is to be found only under the criminal code. It was never the argument of the appellants that such was not the case. Appellants contend that every crime has its civil counterpart in damages but that the civil counterpart does not modify the definition of the criminal aspect wherein civil suit is instituted for damages as a redress. Since no authority is cited by the appellees in respect to the existence of riot, we are forced to assume that the appellees desire the argument to rest upon an interpretation of the facts as they apply to existence or non-existence of riot. If this is the case then the test heretofore applied in appellants' opening brief should be the criterion of judgment.

C. The third feature of the appellees' argument is, as appellants contend, one that would make the appellants a virtual insurer of the safety of all persons using the segment of the highway on which construction was being accomplished by the appellants. The appellants urge that the record is so barren of

any such claim or proof of this contention as to make argument vain, useless and unnecessary.

III.

DAMAGES.

In regard to damages as they apply to this appeal, there are actually three questions:

1. Should a corporation be charged with damages even though it has been demonstrated that its agents (who had the dignity and authority to bind the corporation) have been, by the verdict of the jury, exonerated?

2. If the first question is answered in the affirmative, we then consider whether a corporation thus held to respond in damages generally may, as a part thereof, be held for punitive damages for acts which it did not ratify, condone, or in which it did not participate?

3. If both the first and second question are resolved in the affirmative and against the appellants, the next question is whether the award of damages to the two appellees was actuated by passion or prejudice in such an amount as would shock the conscience of the court.

Appellants suggest the very obvious conclusion that a negative answer to either the first or second question, which would favor the appellants, would make consideration of the third question moot. The ap-

pellants have, on the authority of *Dixie Ohio Express Co. et al., v. Poston,* Fifth C.C.A. 170 Fed. (2d) 446, answered the first question in the negative.

The second question has been answered in favor of the appellants on the authority of *Fuller et al., v. Blanc,* 83 Pac. (2d) page 434 as set forth in appellants' opening brief.

The final question posed on damages has been answered in part by the trial court. The trial court reduced the appellee L. A. Martin's award of actual damages (R. vol. 1-08 p. 63) in the amount of $7000.00 by the sum of $2500.00 (R. vol. 1-08 pp. 60, 61). The appellants contend that the record speaks for itself and that the trial court by such reduction ruled in fact that the award was, as it originally stood, such as to shock the conscience of the court. Appellants further maintain that the sole question to be resolved in the event this phase of the problem is considered by the appellate court, is whether the trial court went far enough in its order of remittitur.

The appellants contend that if the award of the jury, as modified by the trial court, is allowed to stand, and is used in the future as a standard of damages, it appears rather certain the funds of respondents would be long exhausted before any claimant, who had a serious injury, could be properly compensated.

The appellees, in their argument on the question of damages, set forth the general definition of punitive damages taken from American Jurisprudence

and with the general definition of punitive damages we have no quarrel but the case law set forth by the appellees is not helpful to the determination of the case at bar and recites, among others, a malicious prosecution, wrongful attachment suit, two assault cases, one slander case, and a 1954 wrongful death occasioned by a horrible burning taken from the jurisdiction of Mississippi. We have read the cases with interest and we have no quarrel with the authority set forth in the cases cited but we must respectfully submit that they have no bearing upon the case at bar.

At no time did the appellants contend, where actual damages were awarded, that a jury was beyond its right in law to award punitive damages. The appellees have set forth one or more cases in which the state courts have allowed the assessment of punitive damages without the assessment of actual damages. It is the law in our jurisdiction that no punitive damages may be assessed without actual damages. Since there were actual damages assessed there can be no argument but what punitive damages would follow so far as the law of damages is concerned, so long as such damages did not shock the conscience of the court. Whether punitive damages can be properly assessed against the appellants is still another question.

Appellants do however urge that just as surely as good law and common sense dictate that a corporate party cannot be chargeable in tort unless it has, through its agents, servants or some acting party, committed an act or created a wrong for which it

should be charged, neither can a principal be held responsible either for actual damages or punitive damages where its agents are discharged and found to be without fault.

We have heretofore urged the authority of *Dixie Ohio Express Co. et al., v. Poston,* Fifth C.C.A. 1948, cited at 170 Fed. (2d) 446, and we submit that that is good law. This court has set its standards of judgment in *Pac. Tel. & Tel. v. White,* 104 Fed. (2d) 923 on the matter of damages and the relationship of the actors to the master. It is submitted that the application of the law therein, to the facts here presented, can accomplish no other result than a direction of this court for the appellants.

IV.

THERE WAS NO JUDGMENT UPON WHICH TO PREMISE INTEREST AS COMPUTED BY THE TRIAL COURT.

The appellees urge the authority of Barron & Holtzoff, Federal Practice and Procedure at page 221, volume 3. The appellees at page 35 of their brief, recite the last sentence of the paragraph taken from the text on page 221 of that publication.

Attention is called to the fact that the last sentence quoted at page 35 in the appellees' brief is followed by a footnote annotation No. 29 and there is recited in said footnote the case of *Murphy v. Lehigh Valley R. Co.,* C.C.A. 2d 1946, 158 Fed. (2d) 481. The footnote language clearly shows the decision of the

Murphy case to be on nearly all fours with the situation at bar. We quote from the footnote:

> "Where motion to set aside verdict was granted conditionally with leave to plaintiff to file remittitur, which was done, day on which judgment order was then entered was when the notation of judgment in the civil docket should have been made, and that day became the judgment day, from which interest was allowable."

The appellants contend that there is no latitude given to the trial court to set interest on a judgment as the circumstances of equity and discretion might direct. Appellants admit that the law is that the judgment should be entered forthwith except where excusable delay is shown. Where, as in this case, the court by its order of remittitur clearly ruled that the motion of the appellants was not facetious, sham or made for the purpose of delay but on the contrary was a matter of real merit, then there can be no basis for interest, and accordingly no computation of interest until the judgment is entered. The trial court was in error in establishing the interest at a time abritrarily established as ten days next succeeding the verdict of the jury.

V.

CONCLUSION.

The argument herein contained is adopted by the appellants in both of the captioned causes and the argument set forth in appellants' opening brief is

adopted for the purpose of this reply. The judgment of the lower court should be reversed as to these appellants.

Dated, Anchorage, Alaska,
February 26, 1957.

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